PP v. HIDAYATUL AKMAL AZMAN

HIGH COURT MALAYA, JOHOR BAHRU
SHAHNAZ SULAIMAN JC
[CRIMINAL TRIAL NO: JA-41H-16-08-2018]
22 AUGUST 2019

CRIMINAL PROCEDURE: *Sentence – Adequacy – Statutory rape – Guilty plea – Accused a child aged 17 years 11 months – Sentenced to a fine of RM1,000 in default three months' imprisonment – Whether adequate – Whether Magistrate had exercised discretion correctly – Penal Code, s. 376(1) – Child Act 2001, s. 91(1)*

This was an appeal by the Public Prosecutor against the decision of the learned Magistrate (Child Court) sentencing the respondent to a fine of RM1,000 in default three months' jail for the offence of statutory rape under s. 376(1) Penal Code. The facts showed that the respondent was aged 17 years and 11 months at the material time, while the victim, his girlfriend, was 14 years and 11 months old. It was not disputed that the respondent had pleaded guilty to the charge and that the Magistrate, in imposing the sentence, had taken into account the respondent's guilty plea, the fact that he was a child at the relevant time and the recommendations put forth by the Probation Officer that the respondent should only be fined under s. 91(1) of the Child Act 2001. The Public Prosecutor argued that the sentence imposed was excessively inadequate considering the seriousness of the offence and the maximum sentence of 20 years' imprisonment and whipping prescribed by s. 376(1) of the Penal Code, and in the event, urged the High Court to disturb the same and substitute it with a stiffer sentence.

Held (dismissing appeal; affirming the Magistrate):

(1) The court, in determining the appropriate sentence, must have regard not only to the crime itself but also to the criminal individually. For a young offender, it is in public interest that he should be given the opportunity to rehabilitate himself and become a good citizen. (paras 28, 34 & 47)

(2) The respondent was a child when committing the offence. It is thus possible that the respondent was then not yet matured and was unable to recognise the consequences of his action. On the facts, the Magistrate had not erred and had properly exercised her discretion when imposing a fine sentence on the respondent. (paras 41 & 49)

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Mohd Hanis Mohd Nasir & Anor v. PP [2016] 6 CLJ 457 HC ***(dist)***
Nelson Gnanaregasam lwn. PP [2010] 3 CLJ 561 CA ***(refd)***
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA ***(refd)***

A *Peilis Sami v. PP [2014] 6 CLJ 670 CA* ***(refd)***
PP lwn. Awe Sahardi [2016] 1 LNS 1320 HC ***(dist)***
PP v. Abdul Malik Abdullah [2013] 1 CLJ 1008 HC ***(refd)***
PP v. Ling Leh Hoe [2015] 4 CLJ 869 CA ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Stanley Layang Anak Nyadang v. DPP [2018] 1 LNS 1661 HC ***(refd)***
B *Tan Lay Chen v. PP [2000] 4 CLJ 492 HC* ***(refd)***
Teo Siew Peng & Ors v. PP [1984] 1 LNS 71 HC ***(refd)***
Tukiran Taib v. PP [1955] 1 LNS 166 HC ***(refd)***

Legislation referred to:
Child Act 2001, ss. 2, 91(1)(d)
C Criminal Procedure Code, s. 293
Penal Code, ss. 82, 376(1)

For the appellant - Azizah Mohamad; DPP
For the respondent - Mohd Tarmeze Mohd Taib; M/s Tarmeze & Assocs

Reported by Wan Sharif Ahmad

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JUDGMENT

Shahnaz Sulaiman JC:

Introduction

E **[1]** This is an appeal by the Public Prosecutor against the sentence imposed by the Magistrate (Child Court) in Johor Bahru on 20 August 2018.

[2] The respondent was charged for statutory rape punishable under s. 376(1) of the Penal Code.

F **[3]** The charge against the respondent (in Bahasa Malaysia) is as follows:

> Bahawa kamu pada 02 Februari 2018, jam lebih kurang 1945hrs, di bilik hotel no. 340, Hotel Alvis, No. 31, Jalan Dataran Larkin 3, Taman Dataran Larkin, di dalam daerah Johor Bahru di dalam negeri Johor telah merogol XXX (NO KPT: XXX), berumur 14 tahun 11 bulan. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah seksyen 376(1) Kanun Keseksaan.
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> Hukuman: penjara selama tempoh yang boleh sampai dua puluh tahun dan juga dikenakan sebatan.

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[4] The respondent pleaded guilty to the charge and was sentenced to a H fine of RM1,000, in default of which three months' imprisonment.

[5] The prosecution being aggrieved by the sentence imposed has appealed.

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Appellant's Submission

[6] The appellant submitted that the Magistrate had erred as the Magistrate had not taken into consideration public interest when sentencing the respondent. Reference was made to the case of *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256.

[7] The appellant made further reference to the case of *Peilis Sami v. PP* [2014] 6 CLJ 670 and *Nelson Gnanaregasam lwn. PP* [2010] 3 CLJ 561 pertaining to statutory rape.

[8] It was contended by the appellant that the Magistrate had erred when the Magistrate took into account the fact that the respondent had no previous criminal record and the respondent's guilty plea when sentencing the respondent.

[9] The appellant referred to the case of *PP v. Abdul Malik Abdullah* [2013] 1 CLJ 1008; [2013] 8 MLJ 251.

[10] The appellant further submitted that the Magistrate had erred when the Magistrate considered, among others, the fact that the victim was the girlfriend of the respondent at the time of the incident. To support the appellant's argument, the appellant made reference to the case of *Pendakwa Raya v. Awe Sahardi* [2016] 1 LNS 1320.

[11] In support of the appellant's appeal, the appellant submitted the trend of sentencing as reproduced below:

Senarai Kes-kes Melibatkan Jenayah Rogol (Trend Of Sentencing)

1.	*Pendakwa Raya v. Awe bin Sahardi* [2016] 1 LNS 1320 [Mahkamah Tinggi Jenayah Kuala Lumpur]	OKT adalah 18 tahun ketika jenayah rogol berstatutori dilakukan. Hukuman: 12 tahun penjara dan 3 sebatan
2.	*Mohd Hanis bin Mohd Nasir & Anor v. Pendakwa Raya* [2016] 6 CLJ 457 [Mahkamah Tinggi Jenayah Taiping]	OKT pertama adalah 19 tahun dan OKT kedua adalah 17 tahun ketika jenayah rogol dilakukan. Hukuman: 15 tahun penjara dan sebatan sebanyak 5 kali untuk kedua-dua OKT
3.	*Stanley Layang Anak Nyadang v. Deputy Public Prosecutor* [2018] 1 LNS 1661 [Mahkamah Tinggi Jenayah Miri]	OKT adalah 16 tahun ketika jenayah rogol dilakukan. Hukuman: 5 tahun penjara.

A **Respondent's Submission**

[12] The respondent's contention is that the Magistrate did not err when the Magistrate sentenced the respondent to a RM1,000 fine in default of which, a three-month imprisonment term.

B **[13]** The respondent submitted that the Magistrate had, in fact, prior to sentencing the respondent considered the proposal in the Laporan Akhlak which was prepared by the Pegawai Akhlak from the Welfare Department.

[14] The respondent further submitted that it is trite law that an appellate court will not vary or change the sentence of the trial judge unless the trial C judge had erred in law or that the sentence imposed by the trial judge was excessive or inadequate. The case referred to is the case of *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2002] 3 CLJ 457; [2002] 1 MLRA 266.

[15] The respondent also cited the case of *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139; [1981] 1 MLRA 304 relating to the principle D that an appellate court should not alter a sentence imposed only because the appellate court may have imposed a different sentence.

[16] Learned counsel for the respondent submitted that the Magistrate had acted in accordance with s. 91(1)(d) of the Child Act 2001 and s. 293 of the Criminal Procedure Code for youthful offenders.

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[17] The respondent asserted that the sentence imposed by the Magistrate was according to law and that the sentence was not 'manifestly excessive or inadequate'. The respondent referred to the case of *Public Prosecutor v. Ling Leh Hoe* [2015] 4 CLJ 869; [2015] MLRAU 38.

F **[18]** The respondent further contended that the Magistrate had considered the proposal of the Laporan Akhlak and had used her discretion to sentence the respondent. Cases referred to were *Tukiran Taib v. Public Prosecutor* [1955] 1 LNS 166; [1955] 1 MLRH 480 and *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370; [2012] 5 MLRA 20.

G **Principles Relating To Sentencing**

[19] In relation to sentencing, the principles were laid out by the Federal Court in the case of *Bhandulanda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83 as follows:

H > As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, *that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for*

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reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the time in the same country to similar facts may sometimes reach different conclusions (see Jamieson v. Jamieson [1952] AC 525 at 549), it is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for the reason also that this court has said it again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

For discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. (emphasis added)

[20] Judges are therefore vested with wide discretion in the matter of sentencing.

[21] The function of a court in hearing an appeal against sentence is also well set out in the case of *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 which held:

In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.

The principles to be applied in imposing sentence however are the same in every case. *The High Court sitting in exercise if its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.*

… Presidents and Magistrate are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witness with authority. The mitigation submitted by a convicted person will also normally bring up problems of the family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the

convicted person may not be further burdened with additional hardship. This in my view is wrong approach. *The correct approach is to strike a balance, as far as possible, between the interest of the public and the interests of the accused.* Lord Goddard LCJ in *Rex v. Grondkowski* [1946] 1 All ER 560 561 offered some good advice when he said:

> The judge must consider the interests of justice as well as the interest of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of prisoners. (emphasis added)

Analysis And Decision

[22] The respondent was sentenced under s. 376(1) of the Penal Code, which provides the maximum imprisonment of 20 years and whipping.

[23] The Magistrate had sentenced the respondent to a RM1,000 fine, in default of which three months imprisonment.

[24] In the grounds of decision, the Magistrate had, in imposing the sentence on the respondent, considered the following:

(i) The respondent's guilty plea, reference was made to the case of *Tan Lay Chen v. PP* [2000] 4 CLJ 492; [2001] 1 MLJ 135 where Augustine Paul J stated:

> It must not be overlooked that the **general rule is that an accused should be given a lesser punishment for pleading guilty.** There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentence. This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor. (emphasis added)

(ii) The mitigating factors which include:

(a) The respondent's father is employed as an operations assistant at the Ministry of Education earning RM2,400 a month,

(b) The respondent's mother is a housewife who is diabetic and has high blood pressure, and

(c) The respondent works at the MMI factory earning RM1,000 a month.

[25] A scrutiny of the grounds of judgment of the Magistrate has revealed that the Magistrate did not consider the element of public interest when imposing the sentence on the respondent. The Magistrate had not taken into account the public interest.

[26] Public interest is an element to be considered by a judge when sentencing an offender, *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 the court stated that:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v. Kenneth John Ball* 35 Cr App R 164 as follows:
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> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. *A proper sentence, passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case.* Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe. (emphasis added)

[27] The first paragraph quoted above from the case of *Rex v. Kenneth John Ball* would indicate that public interest is the main consideration in the assessment of sentence.

[28] The text then goes on to state that public interest is served, and best served, if the offender is induced to turn from criminal ways to honest living. This is achieved by allowing the courts to determine the appropriate sentence (within the maximum limit prescribed by law) taking into consideration, not only the crime itself but also with regard to each criminal.

[29] In this case, based on the grounds of judgment, the learned Magistrate had considered the guilty plea of the respondent, the economic circumstance of the respondent and the fact that the respondent was a first-time offender. The learned Magistrate in her grounds of judgment took into account the fact that the respondent and the victim met through the 'Wechat' application and the fact that the victim could be taken out anywhere until late into the night. The learned Magistrate further took into consideration that the respondent

had seen sexy photographs of the respondent's girlfriend and the respondent admitted to having sexual intercourse with his girlfriend at Hotel Alvis from late night until morning.

[30] The learned Magistrate also took into consideration the Laporan Akhlak prepared by the Pegawai Akhlak.

[31] The offence for which the respondent was charged for was statutory rape. This court has taken notice that the offence of statutory rape is a serious offence.

[32] Thus, in this case' the court will need to weigh between the seriousness of the offence and the interest of the offender.

[33] In *Teo Siew Peng & Ors v. PP* [1984] 1 LNS 71, Tan Chiow Thong J:

> In the case of a young offender there can be hardly ever be any conflict between the public interest and that of the offender. **The public have no greater interest that he should become a good citizen.** The difficult task of the court is to determine what treatment gives the best chance of realising that object. (emphasis added)

[34] The statement of Tan Chiow Thong J quoted above indicates that for young offenders, it is in public interest that the young offender becomes a good citizen.

[35] In this case, the respondent was aged 17 years 11 months and nine days at the time the offence was committed. The respondent was thus a minor.

[36] The respondent was charged in the Child Court.

[37] Section 2 of the Child Act 2001 defines 'child' as:

(a) a person under the age of 18 years; and

(b) in relation to criminal proceeding, means criminal responsibility as prescribed in s. 82 of the Penal Code.

[38] Thus, based on the definition above, the respondent when committing the offence was a child.

[39] Pertaining to the power of court for children on proof of offence, s. 91(1) of the Child Act 2001 provides as follow:

> (1) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to:
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> (a) admonish and discharge the child;
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> (b) discharge the child upon his executing a bond to be of good behavior and to comply with such conditions as may be imposed by the Court;

(c) order the child to be placed in the care of a relative or other fit and proper person:

(i) for such period to be specified by the Court; and

(ii) with such conditions as may be imposed by the Court;

(d) order the child to pay a fine, compensation or costs;

(da) make a community service order; [Ins. Act A1511]

(e) make a probation order under section 98;

(f) order the child to be sent to an approved school or a Henry Gurney School;

(g) [Del. Act A1511]

(h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court.

[40] Based on the section quoted above, it would appear that the Magistrate had applied s. 91(1)(d).

[41] In light of the fact that the respondent was a child at the point of committing the offence, this court finds that the learned Magistrate had used her discretion and had not erred when imposing a fine on the respondent.

[42] The appellant had submitted that the offence is of a serious nature. The maximum sentence for the offence punishable under s. 376(1) of the Penal Code is 20 years' imprisonment and whipping indicates the serious nature of the offence.

[43] The Deputy Public Prosecutor submitted for the appellant examples of cases with sentencing trends. (Please refer to para. [11] above).

[44] This court finds that the cases put forth for the sentencing trend can be distinguished from the instant case, as follows:

(i) In the case of *Pendakwa Raya v. Awe Sahardi* [2016] 1 LNS 1320, the accused pleaded guilty to an alternative charge and was a first-time offender. However, the accused in this case was 18 years old at the time of the offence and thus was a youthful offender and not a child.

(ii) In the case of *Mohd Hanis Mohd Nasir & Anor v. Pendakwa Raya* [2016] 6 CLJ 457, the first accused was 17 years old at the time of the offence. This case went on to full trial.

(iii) In the case of *Stanley Layang Nyadang v. Deputy Public Prosecutor* [2018] 1 LNS 1661, the accused pleaded guilty and was 16 years old at the time of the offence.

[45] Furthermore, the Court of Appeal in the case of *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370; [2012] 5 MLRA 20 held:

> The next question is must all these teenagers who commit similar offence as the appellant be punished with imprisonment?
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> It is a well accepted principle of sentencing that young offenders, wherever possible and depending on the nature of the offences committed, should be kept out of prison, especially when there are other adequate means of dealing with them. Bellamy J in *Tukiran bin Talib v. Public Prosecutor* [1955] 1 MLRH 480; [1955] 1 MLJ 24, held that:
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> > it is desirable that young offenders, that is, offenders between the ages of 17 and 21, who are also first offenders should be kept out of prison, if possible.

Decision

[46] Based on the findings of this court and the authorities quoted, this court is of the view that the learned Magistrate had not erred in her decision.

[47] This court is of the view that it is in public interest the respondent should be given the opportunity to be a good citizen and rehabilitate himself. In the event the respondent be imprisoned at a young age, the respondent be turned into a hardened criminal.

[48] The respondent is a first-time offender. The recommendation from the Pegawai Akhlak is that a fine be imposed in accordance with s. 91(1)(d) of the Child Act 2001.

[49] As a child, it is possible that the respondent has not yet matured and was unable to recognise the consequences of his actions.

[50] Thus, this court is of the opinion that the respondent should not be imprisoned and whipped. Instead, the respondent should be given the opportunity to become a good member of society.

[51] This court thus rejects the appeal from the prosecution and the sentence of the Magistrate is hereby affirmed.